ONG ON NIN

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, MUAR
RICHARD TALALLA JC
[CRIMINAL APPEAL NO. 41-22 OF 1989]
3 MARCH 1990

CRIMINAL PROCEDURE: *Kidnapping - Section 363 of the Penal Code - Conviction - Appeal - Contention that girl left home on her own volition - Statement recorded pursuant to s. 113 of Criminal Procedure Code - Statement admitted in evidence - Whether appropriate punishment in the circumstances - Whether public interest will be served - Sum to be commensurate with the amount that the appellant is currently earning - Sentence to be sufficiently punitive for the accused to realise severity of offence.*

EVIDENCE: *Statement of accused - Friendship metamorphosed into love - Love letters - oath of marriage at chinese temple - Girl threatened to run away - Confession of seduction - Burden of proof on prosecution - Whether girl was enticed.*

The appellant on this case was charged with kidnapping a girl under 16 years of age from the legal guardianship of her mother and therefore committed an offence punishable under s. 363 of the Penal Code.

The appellant was found guilty and was sentenced to 15 months imprisonment from date of conviction.

The appellant appealed and his main ground of appeal and the only one meriting consideration was that the girl, the subject of the charge, had left her parents home on her own volition.

Held:

[1] The calculated conduct of the appellant did constitute 'enticing' under the provisions of s. 361 of the Penal Code.

[2] There is no merit in the appeal insofar as it relates to the conviction of the appellant.

[3] Public interest would not have been served in sending the appellant to prison and the appropriate punishment in this particular case would be the imposition of a fine in an appropriate sum.

[4] The amount of the fine is to be commensurate with the amount that the appellant is currently earning and the sentence must be punitive enough for the appellant to realise the seriousness of the offence he committed.

[5] Accordingly, appellants appeal against conviction is dismissed and the sentence of 15 months imprisonment is set aside and the appellant is fined a sum of RM6,000 in default 15 months imprisonment.

[Appeal dismissed.]

Case referred to:
Tan Kah Eng v. Public Prosecutor [1965] 2 MLJ 272

Legislation referred to:
Criminal Procedure Code, s. 113
Penal Code, ss. 361, 363

For the appellant - K. Sila Dass; M/s. K.S. Dass & Partners
For the respondent - Saufee Afandi (DPP)

JUDGMENT

Richard Talalla JC:

The appellant was charged in the Magistrate's Court Batu Pahat, that he did on 31 May 1979 at about 12.30p.m. at a certain place at Batu Pahat in the District of Batu Pahat, in the State of Johor, kidnap a certain named female under 16 years from lawful guardianship of her mother and that he did thereby commit an offence punishable under s. 363 of the Penal Code.

The complaint was made on 22 October 1979. The case which was set down for hearing on 26 May 1981 was repeatedly postponed. It was finally heard on 19 March 1989 was going over to the next day when the appellant was found guilty of the offence charged, convicted and sentenced to 15 months imprisonment from date of conviction.

The appellant appealed. His main ground of appeal, and the only one meriting consideration, was that the girl, the subject of the charge, had left her parents' home on her own volition, gone to Muar where she met the appellant and a job for her, which he did. That being the case, the appellant claimed that he could not be said to have taken the girl out of the keeping of her lawful guardian.

The girl was born on 1 March 1964 and was 25 years old when the trial of the appellant took place. At the trial she and her parents gave evidence, as did one ASP Haji Abu Hassan bin Sarong before whom the appellant had on 23 October 1979 made a statement which was recorded pursuant to the provisions of s. 113 of the Criminal Procedure Code. The statement was admitted in evidence by the learned Magistrate. It was not objected to by the appellant at the trial nor instead was it questioned in this appeal.

In his statement the appellant said that he arrived at Semerah to work as a tractor driver in 1975 when he came to know the girl. She was then about 12 years old. He met her on her way to school. He started up a friendship with her. Then he began writing her letters. They were friendly letters; like between brother and sister. He advised her to study diligently. In 1978 he was still corresponding with her but the correspondence had metamorphosed into love letters. There were some 10 letters exchanged by him in that year. He went on to confess that in February 1979 at about 10 o'clock in the morning he and the girl went to a Chinese temple at Tongkang Pecah. There they made an oath that they would get married. They agreed that they would not separate and would remain together until death. They then returned to Semerah. He further confessed that in the year 1979 he continued to exchange several love letters with the girl and in a meeting with her in that year he promised to take her to Kuala Lumpur to marry her. The appellant continued on to say that on 31 May 1979 the girl sent him a letter. In it she asked him to come to Muar, saying that if he did not do so she would run away. He did so and met the girl at the bus stand. He asked her what the matter was. She urged him to take her to Kuala Lumpur; to look for a job. He told her to return but she declined, saying she was afraid that if she did she would be beaten. So he took her to Kuala Lumpur, in his motor car. There he associated with her until the end of September 1979. He then took her back to her parents home in Batu Pahat. In the time that he was with her in Kuala Lumpur he confessed to having seduced her twice.

Section 361 of the Penal Code provides that whoever takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship. Under s. 363 whoever kidnaps any person from Malaysia or from lawful guardianship, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.

As I understand the law there must be proof by the prosecution of taking or enticing in order to establish a case of kidnapping under s. 361 of the Penal Code. The prosecution is required to prove that the accused took some active step, by persuasion or otherwise, to cause the girl to leave home. In this case the association of the appellant with the girl went back to the time when she was 12 years old. He systematically cultivated her trust, beguiling her into a relationship of innocent concern. Big brother - kid sister - study hard. Then craftily he converted the relationship into the one he was really after.

In the circumstances I could not see that the appellant's calculated conduct, spanning over a number of years, during which he so mesmerised the girl, resulting in her becoming thoroughly infatuated with him, whereafter he seized the chance to take her to Kuala Lumpur, seemingly on her own prompting, did not constitute enticing under the provisions of s. 361 of the Penal Code.

Accordingly I hold that there is no merit in the appeal insofar as it relates to the conviction of the appellant.

In regard to sentence, the appellant was ordered to be imprisoned for 15 months from the date of conviction. To my mind the sentence was not excessive. Young girls should be free to go to school alone without fear of being influenced and seduced by scoundrels like the appellant.

It is true that though he took the girl to Kuala Lumpur and ravished her he did return her to her parents at Batu Pahat and thereafter offered to marry her. But the offer was turned down by the family; for good reason. The appellant was already married. He was then 28 years old and had 4 children.

However in this case more than 10 years have elapsed since the date of complaint. To my mind the appellant was entitled to be tried within a reasonable time after complaint. In the event he would then have been convicted, sentenced, served his term and paid his debt to society. Thereafter he would have been free to get on with his own life. Instead, through no fault of his own, he has had this charge hanging over his head for more than 10 years. As already stated he was married at the time of the offence. I am informed that he is a first offender, to date has not been in any other trouble with the police, remains married and now has 5 children, 3 boys and 2 girls, of ages ranging from 16 to 10 years. In the circumstances special to this case I do not consider the public interest will be served in sending the appellant to prison. It would be unjust to do so. It seems to me that the appropriate punishment in this particular case is the imposition of a fine in an appropriate sum. That sum is to be commensurate with the amount that the appellant is currently earning. See the judgment of Ambrose J in *Tan Kah Eng v. Public Prosecutor* [1965] 2 MLJ 272. The sentence must be punitive enough for him to realise the seriousness of the offence he committed, an offence which I am sure he will not wish any person of his ilk to visit upon his own children.

His Counsel informs me that the appellant is currently working as a crane driver earning RM35 to RM40 a day.

Accordingly the appellant's appeal against conviction is dismissed. As to sentence, the sentence of 15 months imprisonment is set aside and there is substituted therefore a fine of RM6,000 in default 15 months' imprisonment.

Also found at [1990] 1 CLJ 1176